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## MARBURY v. MADISON

### (1 Cranch 137)

This is, in some respects the most important decision ever rendered by the Supreme Court of the United States. In it, for the first time, that court subordinated the Congress of the United States, by assuming the right to declare its legislation void. In order to understand the case, facts not declared in it must be kept in view. The writer of the opinion was John Marshall. Marshall was a lawyer-politician of the state of Virginia. A member of the lower house of that state from 1782 to 1795, he later entered Congress as a Federalist. A warm supporter of John Adams' administration, he was appointed by that President Secretary of War and then Secretary of State. A vacancy occurring in the Chief Justiceship, he was, on January 31, 1801, commissioned by Adams to fill it. This was less than five weeks before the succession to the presidential office of Thomas Jefferson. At the time of his appointment, Adams and Jefferson were rival candidates for the presidency; the contest between them was bitter and truculent. Jefferson and Burr(Republicans) received 73 electoral votes; Adams and Pinckney (Federalists) respectively 65 and 64. The equal votes of Jefferson and Burr threw the election into the House, the majority in which was Federalist. By a party caucus, the Federalists resolved to support Burr for the first place, but, after 35 ballots, a sufficient number of them abstained from voting to decide the contest in favor of Jefferson.

Having lost the presidency for the next four years, the Federalists, says Wilson,[1] "used their majority [in Congress before March 4, 1801] when the result of the election became certainly known, to make themselves secure, as they hoped, of the possession of, at any rate, the judicial branch of the government. On the 13th of February, 1801, less than three weeks before the day upon which Mr. Jefferson was to become President, they put through Congress, by a strictly party vote, a Judicary Act which very considerably enlarged the number of federal courts and added some $50,000 to the annual judicial budget notwithstanding the fact that the legal business of the country justified no such expansion of the federal judicial machinery, and Mr. Adams hastened to fill the new judgeships, as well as every other vacant place, great or small, with staunch Federalists. On the 31st of January he had appointed Mr. John Marshall, of Virginia, Chief Justice of the Supreme Court of the United States, an approved lawyer, but a tried Federalist, and but just turned of forty-five. The government of the country passed into Mr. Jefferson's hands as stoutly fortified against change or misuse as a solidly Federalist personnel in the courts could make it."

In the closing hours of Adams' administration he had nominated certain persons to sundry offices, and among them William Marbury to the office of a justice of the peace for the District of Columbia. The nominations had been confirmed by the Senate, and the commissions made out and signed by the President; but they had not been delivered when the new administration came into power. Jefferson and his Secretary of State, Madison, indignant at the effort of an expiring administration to create and fill a large number of offices, decided to refuse to deliver the commissions. The balked appointees resolved to carry a test case to the Supreme Court of the United States.

Jefferson was more feared and hated by the Federalist leaders than any President since by his opponents; than Jackson or Roosevelt. Hamilton described him during the campaign as "an atheist in religion and a fanatic in politics."[2] Marshall the new Chief Justice, was a personal and political enemy of the new

[1]History of American People, iii, 163.

[2]Schouler, Hist. of U. S., 465.

President. He was as "obnoxious to Jefferson," says Carson,[3] following Henry Adams, "as the most rigid New England Calvinist would have been, for Jefferson had determined upon restricting the powers of the national government in the interests of human liberty, and Marshall was bent on enlarging the powers of the government in the interests of justice and nationality." These protagonists did not love each other. As they stood "face to face upon the threshold of their power," says the same writer, "each could foresee that the contest between them would end only with life."

The relations of Marshall to the Jefferson administration made a dispassionate and impartial judgment by him in the Marbury case impossible. The real issue therein lay between John Marshall and Thomas Jefferson—a trial of strength in their new positions. Carson even parodies the name of the case by styling it Marshall v. Jefferson. With this conception of the motive forces behind the logic of the decision, let us now briefly examine it.

Marbury demanded his commission from Madison, the new Secretary of State, and it was refused. He asked the Supreme Court for a mandamus. He was not entitled, finds Marshall, C. J., unless his appointment to the office had been complete. But it was complete. It became complete when, after the nomination to the Senate, and the confirmation by that body, the President, Adams, finally decided to appoint Marbury. This decision he expressed by signing the commission and delivering it to his Secretary of State, who was John Marshall, at the time the Chief Justice also, and whose duty it then became to affix the seal of the United States to it, and to deliver it to the appointee.[4]

Could Jefferson remove Marbury, and was the refusal to deliver the commission equivalent to such removal? The answer to this question is, no. The appointment was for five years. Within that time, the President could not remove Marbury.

Is Marbury entitled to receive the commission? The answer

[3]The Supreme Court of the United States, p. 205.

[4]Parton's "Jefferson" is authority for the story that at the stroke of twelve on the night of March 3, 1801, Lincoln, Jefferson's Attorney-General, entered the Secretary of State's (Marshall's) office with Jefferson's watch in his hand and stopped Marshall in his work, and that Marshall took up his hat and left the commissions behind him (1 Schouler, Hist. U. S., 492).

is, yes. If he does not receive it, must he be content with damages? or may he obtain by the aid of the court, the commission itself or a certified copy of it? The answer is, damages would be no adequate redress. Marbury must receive the commission or a copy of it.

But how is the delivery of the commission to be secured? By mandamus. But can so high an officer as a Secretary of State be commanded to do something by a court? Yes, says Marshall, C. J., "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." If the law imposes an absolute duty even on a Secretary of State [even on a President?] performance of it can be constrained by a court.

But by what court? By the highest? No, the answer is, but by a lower court, a circuit court of the United States, where two judges sit, both unknown to fame. And their decision will be final; that is, even the highest executive officer will be in contempt in disobeying their mandamus, without right of appeal, unless the Congress chooses to give an appeal to the Supreme Court.

Why was this position taken? We shall see first whether principles of interpretation and logic required it. If not then we shall easily divine the motive.

The Act of Congress, if valid, unquestionably bestowed on the Supreme Court the right to issue a mandamus in a suit begun in that court. The isssue of the mandamus was inevitable on the principles stated, unless (*a*) the Act conferring jurisdiction in mandamus was unconstitutional and (*b*) in consequence thereof it was the right and duty of the court to decline to execute it. We shall here say nothing concerning the latter question.

The Constitution declares that the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all the other cases before mentioned in Article III the Supreme Court shall have appellate jurisdiction, with such exceptions as Congress shall make.

The gift of original jurisdiction in four classes of cases, argues the Chief Justice, is not only not a gift of other original

jurisdiction by the people who ordained the Constitution, but is a prohibiti on against any such gift by Congress. To say that the court *shall* have power *a*, *b*, *c*, *is* to say that Congress shall not confer on it power *d*, *e*, *f*. If, he argues, it had been intended to allow Congress to apportion the judicial power between the Supreme Court and inferior courts, the third clause of Section 2 of Article III would have been useless. "If Congress remains at liberty to give this court appellate jurisdiction, where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution is form without substance."

The unsubstantiality of this criticism is apparent to the meanest intellect. May not the ordainers of the Constitution have intended that the Supreme Court should have original jurisdiction in four classes without intending that they should not receive any more if Congress chose to bestow more?

The ordainers defined the judicial power of the United States, but they did not directly bestow this power upon any definite organs. It was to be exercised, if at all, by courts; but how much of it should be exercised by this court, or by that, was intended by them to be determined by Congress. They have, so far, excepted from this determining power, the named original jurisdiction of the Supreme Court, that that court, as soon as it comes in to existence, acquires *ipso facto* that jurisdiction. How could their intention that that court should, Congress *volente*, Congress *nolente* have such jurisdiction, be expressed otherwise than by the phrase employed, even if they also intended that Congress should have power to bestow other original jurisdiction?

The phrase, "In all cases affecting ambassadors, other public ministers and consuls, etc., the Supreme Court shall have original jurisdiction" might quite as plausibly have been held to mean that in such cases, the Supreme Court only shall have original jurisdiction. Yet the accepted doctrine on this point is that the declaration that the *Supreme Court shall* have original jurisdiction is not a declaration that *no* other court *shall*.[5]

[5]Graham v. Stucken, 4 Blatchef. 50; Ames v. Kansas, 111 U. S. 449; United States v. Louisiana, 123 U. S. 32; Cooley Const. Law, 129; 2 Willoughby, Const. 974.

The Judiciary Act of 1789 gave to the District Courts of the United States jurisdiction of "all suits against consuls or vice-consuls." Its constitutionality was affirmed by Chief Justice Taney who remarked that "the grant of jurisdiction over a certain subject matter to one court, does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question, there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject-matter."[6]

If other courts *may*, at the will of Congress, have this original jurisdiction, why *may* not the Supreme Court, at the will of Congress, have *other* original jurisdiction? The intent to prohibit all other courts' having this jurisdiction is quite as clearly manifested, as the intent to prohibit the Supreme Court's having original jurisdiction in other cases.

At this point it may be observed that a plausible argument might be found in the language of the Constitution against the power to confer on inferior courts jurisdiction in cases affecting ambassadors, other public ministers and consuls. The Constitution gives the Supreme Court original jurisdiction in such cases. In all the other cases mentioned in the first clause of Section 2 of Article III, that is, in cases arising under the Constitution, laws and treaties, in cases of admiralty and maritime jurisdiction, in controversies to which the United States is a party, in controversies between two or more states, etc., the Supreme Court shall have appellate jurisdiction, subject to exceptions made by Congress. This taken literally is a gift of appellate jurisdiction only in "all the other cases," *i. e.*, cases other than those affecting ambassadors, other public ministers and consuls, and cases in which a state is a party. Hence, if a lower court entertains originally one of these cases, its decision must be final, the Supreme Court not having any appellate jurisdiction. This might be an argument of more or less strength, against the power to bestow jurisdiction on the inferior courts, over cases affecting ambassadors, etc. This argument has not prevailed.[7]

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[6]Gittings v. Crawford Fed. Cases, No. 5465; Jurisdiction and Procedure of Supreme Court, Taylor, 45.

[7]Cf. Cohen v. Virginia, 6 Wheat. 397; 2 Watson, Constitution 1125.

The third article of the Constitution defines the judicial power of the United States, and vests this power in one Supreme Court and in such inferior courts as Congress may establish. After saying in what cases the Supreme Court shall have original jurisdiction, it adds, "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction" under regulations of Congress. A literalist critic like Marshall would conclude from this that the Supreme Court could have appellate jurisdiction only in these cases. The words, the Supreme Court *shall* have original jurisdiction, are a prohibition to it of any other original; the words, "in all the other cases before mentioned, the Supreme Court *shall* have appellate jurisdiction," are a prohibition of appellate jurisdiction in any other cases. But, such is not the accepted conclusion. Congress may give that court appellate jurisdiction in other than the cases before mentioned," *e. g.*, in cases arising in a congressional court of private land claims in a territory[8]; in cases arising in territorial courts, which courts are not those contemplated by the 3rd Article;[9] in cases before the Interstate Commerce Commission.[10]

Indeed, the petty verbal criticism which guides the Chief Jnstice to the conclusion that the provision that the Supreme Court shall have jurisdiction in *a*, *b*, *c*, is a prohibition of its receiving any other jurisdiction, would make it impossible for the United States to create territorial courts and bestow upon them any jurisdiction. Article III says, "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may establish." The judicial power is *all* the judicial power. But the judges of these courts are to hold office during good behavior. The territorial judges do not so hold office. Nor is their jurisdiction limited to the classes enumerated in the second section of Article III.[11] Plainly the jndicial power exercised in the territories, by the appointees of the President and the Senate, is the judicial power of the United States, and as plainly the assertion in the 3rd Article that the judicial power of the United States shall extend to all cases

[8]United States v. Coe, 155 U. S. 76; Taylor, Jurisdiction of Supreme Court, 269, 281.

[9]*Ex parte* Cooper, 143 U. S. 472; Taylor, Jurisdiction, etc., 309.

[10]Taylor, Jurisdiction, etc., 301.

[11]Clinton v. Engelbrecht, 13 Wall. 434; Benner v. Potter, 9 How.235.

arising under the Constitution, the laws and treaties, to cases affecting ambassadors, etc., is not a negation of any other judicial power. Marshall, C. J., himself perceived this when he held that despite the assertion in Article III that the judicial power should extend to all cases of admiralty and maritime jurisdiction, and that this power should be vested in judges with a tenure during good behavior, an admiralty power could be vested in the judges of the territory of Florida, who held office but for four years.[12]

In a sentence from the opinion of Marshall, C. J., previously quoted, he says if Congress may give appellate jurisdiction to the Supreme Court, in cases in which the Constitution gives it original, the distribution of jurisdiction is form without substance. We have already pointed out that the possession by inferior courts of original jurisdiction in cases affecting ambassadors, etc., is not contested. But, if they have original jurisdiction in such cases, are we to say that that jurisdiction must be final? And, if it is not final, what court other than the Supreme Court is to exercise the reviewing authority? It would be peurile to say that it was the intention of the enacters of the Constitution to allow the inferior courts original jurisdiction over a class of cases over which also the Supreme Court had it, and yet to deny to the Supreme Court the right of entertaining appeals from the judgments of the inferior courts in that class of cases.

It is a quite sensible arrangement of jurisdiction that makes it possible for the Supreme Court, and also for circuit courts, to entertain suits of the same class originally; and it is equally sensible that there should be a right of appeal from the decisions of the circuit courts in cases in which they take original jurisdiction to the Supreme Court.

The Chief Justice says that any other construction than his would make the words "without effect." Is it to produce no effect to ordain that the Supreme Court shall have original jurisdiction, with or without the sanction of Congress, but that Congress may, if it chooses, also confer this jurisdiction on other courts, providing for an appeal to the Supreme Court? Without the provision, the Supreme Court would have had no original jurisdiction unless Congress had so willed. With it, that court

[12]Insurance Co. v. Bales of Cotton, 1 Peters 511.

has this jurisdiction whatever Congress may will. Is that not an "effect?"

The Chief Justice argues that, if the Constitution ordainers had intended only to secure to the Supreme Court, beyond the contingency of Congressional action, original jurisdiction in the enumerated cases, they would not have added the words "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction." etc. How was this discovered? Had not these words been added, might not some jurist as literalist as the Chief Justice have argued that the Supreme Court was intended only to have the original jurisdiction? If they designed this court to have also appellate jurisdiction, why should they not say so? Why leave it to the speculation of judges and publicists? The use of the language is fully explained by the desire to declare that the Supreme Court should have appellate jurisdiction besides original. It is unnecessary to suppose that it would not have been used, but for the intention to exclude any original jurisdiction that Congress might wish to confer. The intended "restriction on the powers of Congress" was that of taking away the original jurisdiction conferred, not that of adding to such jurisdiction.

It is quite evident that a mind as well developed as Marshall's could not have been betrayed into putting upon the Constitution so narrow and unstatesmalike an interpretation, but for the desire to accomplish an end which could not otherwise be accomplished. From his conspicious bench he had an opportunity to administer a lecture to his rival, the hated President Jefferson. He could proclaim to the nation that the good Marbury had a right which the wicked Jefferson, through his Secretary of State, was trampling under foot. But, Jefferson was still formidable. He was Commander-in-Chief of the armies. He was a philosopher and publicist, who had little regard for constitutional quibbles. Just chosen by the people, he would not be disposed to take the law from a man his personal and politicial enemy, whose elevation to the Chief Justiceship five weeks before he came into power he could regard as a studied insult to himself by his predecessor. Suppose a mandamus issued? What would Mr. Jefferson allow Madison to do? Would he submit, or would he ignore the writ? If he ignored, what would Marshall do? Raise an army to put Madison and Jefferson in jail for con-

tempt? The situation then was such that, with all his demonstrating that Marbury had been wronged by the new administration, he had to find an excuse for not launching his mandamus. He was driven then to invent two constitutional heresies, of which the first was that the second clause of the third Article forbade Congress to give any original jurisdiction to the Supreme Court;and the second of which was the doctrine that an Act of Congress, said or thought by the court, to transcend the Constitution, could be properly disobeyed by it, and that the enforcement of it by executive officers could be restrained or punished with damages.

These, truly, are great results to flow from the rivalries and jealousies, the pugnacity blended with prudent timidity, of judicial and other politicans. But so, for ages, have social and politicial institutions been fashioned. And we venerate them.

# MOOT COURT

## COMMONWEALTH v TEMPLE.

### Sale of Liquor —Act Once Declared Unconstitutional Declared Constitutional.

STATEMENT OF FACTS.

One, John Temple, was indicted and convicted in the court below for the illegal sale of liquor. The facts are as follows:

A statute forbidding the sale of liquor anywhere, but suspending its operation in any county, upon a vote of the people at the next election in November, was followed in November, by a vote of the people of the county A in favor of the effectiveness of the statute. One, Thompson, however, thinking the act unconstitutional, sold liquor. Indicted, he was convicted, but the Supreme Court reversed the judgment, holding the law unconstitutional. Subsequently, and with knowledge of this decision, Temple sold liquor. He was convicted, the trial court thinking the decision of the Supreme Court unsound. Before Temple's appeal is heard in the Supreme Court, that court affirmed the conviction of one, Fox, but this decision was subsequent to Temple's act of selling.

Jackson for Plaintiff.
Storey for Defendant.

OPINION OF THE COURT.

SPOTTS, J.—When a legislative act proves to be invalid it is for all legal purposes as if it had never been. In Norton v. Shelby County, 118 U. S. 425, J. Field says: "An unconstitutional law is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Now the question to be decided in this case is: Was the statute constitutional and unconstitutional at different periods or constitutional from the time of its enactment? If constitutional from the time of its enactment then the conviction of Temple must be sustained. If it must be considered as unconstitutional, and therefore inoperative, up until the Supreme Court affirmed the conviction of Fox, then Temple ought not be convicted under the statute.

The validity of a law ought not be determined in advance of its actual operation. This principle was so held on application to restrain the publishing of returns of the vote under an alleged invalid local option statute (Clayton v. Calhoun, 76 Ga. 270). Therefore, when Thompson assumed to disobey the statute as invalid he did so at the risk of being

punished if the law was sustained. But the law was not sustained and Temple, with knowledge of this decision subsequently sold liquor.

It seems to be settled that a decision in favor of the validity of a statute conclusively settles the question, as to its constitutionality (36 Cyc. 975). But where a statute is held unconstitutional it will remain inoperative while such decision is maintained, but if it is subsequently reversed, such statute will be held *valid from the date of its enactment* (8 Cyc. 805).

Again, under the discussion of Judicial Construction in 8 Cyc. 728, after enumerating the classes of cases that can be brought to the attention of the judiciary for judicial construction, it adds: "And when this is done the law as declared in the judgment rendered must be taken as the authoritative rule within the jurisdiction in which it is announced, until *reversed,* overruled, or changed by constitutional amendment or legislation." Reasoning upon this statement in the light of the principle "that a statute declared unconstitutional and subsequently reversed, such statute will be held valid from the date of its enactment" I conclude that the judgment referred to applies particularly to a judgment declaring the statute constitutional and not to one in an unsettled state because of one decision declaring it unconstitutional. The more so because of a statement in Cyc. 6, 804, which says: "But a decision that a statute is unconstitutional to be *effective* must be *distinct* and *positive.*"

That the law was unsettled is shown in the conviction of Fox. If Fox could be convicted so could Temple, otherwise the judiciary would not have an opportunity to reverse a decision and thus correct any error it may have made. And since the legislative department must remain as separate and distinct as possible from the judicial department in performing its functions, it is obvious that great injustice would be done if the judiciary could not correct its own errors. The judiciary, though the final judge of what the law is, is not the judge of what the law should be. It follows that the judiciary must exercise the greatest precaution in deciding upon the constitutionality of a statute so as not to encroach upon the powers of the legislative department.

The affirmation of the conviction of Fox settled the constitutionality of the statute and that question once decided it cannot be raised again. In support of this I cite Wheeler v. Rice, 1 Camp. 213, 1871, when a bill for an injunction to restrain defendants from proceeding, under an act of 1870, to erect the public buildings mentioned in that act, the question was raised as to whether the act was unconstitutional. The Supreme Court had previously considered this question, and had upheld the act of 1870 as constitutional in Bird v. Rice, 63 Pa. 489, but the same objections had not been raised then as were raised in this case. *Held* that the constitutionality of the act was *res adjudicata,* and that the court would presume that every objection to the constitutionality of the act had been considered.

In view of all the principles discussed and relying on the decision of Pierce v. Pierce [quoted by attorney for commonwealth] as a precedent for this case, I conclude that the effect of the reversal of the first decision in the case at bar was to render the statute valid, not from the time

of the conviction of Fox, but from the time of its enactment. And that while the law was still in an unsettled state Temple sold liquor at his peril no less than did Fox.

Conviction sustained.

## OPINION OF SUPREME COURT.

The real question in this case is whether the subjects of the state can rely on the information given them by its Supreme Court as to the law to which they are subject.

In other, more favored countries, citizens may readily know whether what purports to be a law is a law or not. If it passes the two houses of the legislature, receives the approval of the chief executive, and is published as a law, it is a law. In this country the courts have succeeded in making themselves a fourth house of legislation; but unfortunately they do not act before the official publication of a law. It indeed must appear to have become a law, and people must appear to have become subject to it, before the courts announce their will. Three, six, ten, twenty years may elapse, during which the "law" has seemed to be a law, before the court declares that it is not a law. The situation of the subject is serious enough, when he is compelled to hazard an opinion on the operativeness of the law in advance of the pronouncements of the judges. The legislature that passed it, the governor that signed it, have, in so doing, certified to him that it is a law, He is bound to distrust them and form a judgment for himself, prior to judicial declaration. If even judicial declaration he continues bound to distrust, his state is deplorable. In the case before us the Supreme Court has told Temple that the act, for violating which he is on trial, is not a law, and that he is, therefore, under no duty to obey it. Reverencing the impeccable judgment of the court, he has not heeded the statute. He has done an act which, if it be not a law he had a perfect right to do. He is, nevertheless accused of a crime, on the ground that the Supreme Court is fallible and its judgments only provisionally and transiently sound, and that the same court has, since his act done in dependence on the finality of its opinion, changed its mind. When he did the act, it was innocent according to the judicial declaration then extant. By a declaration *ex post facto* it is shown to have been illegal. This surely, is not a situation to be accepted with contentment.

We cannot prevent the court's saying that acts are void, when they are in fact valid, or that they are valid when they are in fact void, but can we do nothing to prevent the intolerable injustice of holding acts, alone in reliance on their decisions for being subsequently, on their change of view, made punishable?

In Menges v. Dentler, 33 Pa. 495, a sheriff's sale of land was declared by the Supreme Court void. An Act of Assembly was then passed making the sheriff's deed valid to all intents and purposes. In an ejectment turning on the constitutionality of this act, it was declared valid, and the judgment was affirmed by a vote of three judges to two (See 9 Barr 110). Several years afterwards, A bought some of the land em-

braced in the sheriff's deed from the sheriff's vendee. In an ejectment against him, the trial court held itself bound by the judgment of the Supreme Court and rendered a verdict for the defendant. On the appeal from this judgment, the Supreme Court, departing from its former opinion and conceding that the Act of Assembly was void, however refused to deprive the defendant of the land, saying, "It is quite plain that the present title depends upon faith in that department of government which alone may deal with such a subject, and upon the good faith of government in protecting those that trust in it. Men naturally trust in their government, and ought to do so, aud they ought not to suffer for it" (Cf also, Geddes v. Brown, 5 Phila. 180; Bellerjeau's Estate, 18 Phila. 83).

An application of this principle was made in State v. O'Neal, (Iowa) 126 N. W. 454. That court refused to permit a conviction under a statute which had been declared unconstitutional before the defendant's violation of it, but which, since the violation, it had pronounced constitutional.

A similar principle has been extended to cases where the interpretation of statutes has varied. If, in reliance on one interpretation, acts are done by a person, a subsequent change of interpretation will not be applied to those acts (State v. Bell (N. C;) 49 S. E. 163; State v. Felton (N. C.) 63 S. E. 145. In the latter case, the courts had decided that a husband could not be convicted of slandering his wife. A husband subsequently slandered his wife. A conviction was not allowed to stand although the court had meantime changed its mind. "A decision of this court [the Supreme Court] is the law until it is overruled and the reversing decision should not be given retroactive effect."

Reference is made by the learned court below to Pierce v. Pierce, 46 Ind. 86. A death occurred in 1861. The act of 1852 would have given his estate to the widow of the deceased. An amendment to this act was adopted in 1853, which, if valid, gave the estate to the widow and to the mother. In 1854 the act of 1853 was denounced by the Supreme Court as unconstitutional, in the case of Langdon v. Applegate. This decision was overruled in 1867. Although the death occurred while this case was deemed to express the law, it was held in 1874 that the descent of Pierce's estate must be regulated by the act of 1853, but the court adds, "It will be understood, we presume, that we decide the case upon its own facts. The parties claiming the estate, each assert a claim by virtue of the statute of descents. We decide nothing as to what would be the rule, had the parties to whom the estate descended, conveyed the same *before* the case of Langdon v. Applegate was overruled [in 1867], and had the purchaser been a party asserting a claim." Very likely, had such been the case, the court would have done what was done in Menges v. Dentler, *supra*. No act had been done in reliance on the soundness of the decision in Langdon v. Applegate, the reversal of which would have put the doer in a disastrous predicament. We see nothing in Pierce v. Pierce inconsistent with the decision we have reached.

Judgment reversed.

# COMMONWEALTH v. NONES

## Former Testimony of Deceased Witness.—Impeachment.

### STATEMENT OF FACTS.

Before the justice who committed the defendant, John Maple had testified to the larceny by Nones, in the presence of Nones, whose counsel cross-examined him. At the trial, Maple being dead, the notes of the evidence were used by the Commonwealth, which conceded that without them it could not ask for a conviction.

Defendant offered to show that Maple, both before and since the hearing before the justice, had declared, on several occasions that he had no knowledge on the subject, and that he had accused another person of having committed the larceny, who had been acquitted. He also offered witnesses to prove that the reputation of Maple for veracity was bad.

The court excluded the offers and a verdict of guilty was rendered.

Houseman for Commonwealth.

Barrett for Plaintiff.

### OPINION OF THE COURT.

REICHELDERFER, J.—The questions for consideration in this appeal are whether the trial court erred in excluding defendant's offers of evidence: (1) Defendant offers to show that Maple, both before and since the hearing before the justice, had declared on several occasions that he had no knowledge on the subject, and that he had accused another person of having committed the larceny, who had been acquitted; and (2) defendant offered witnesses to prove that the reputation of Maple for veracity was bad.

The first requisite before a witness can be impeached, as was held in 156 U. S. 237, and which seems to be the established rule is: "Before a witness can be impeached by proof that he has made statements contradictory or differing from the testimony given by him upon a former trial a foundation must be laid by interrogating the witness himself as to whether he has made such statements."

In Stacy v. Graham it was held "that if the statements came to the knowledge of counsel afterwards and before the trial, and were a direct admission that the witness had sworn falsely, it was the counsel's duty to apply for a postponement until the evidence could be procured. The absence of a witness has never been considered a reason for allowing his unsworn statements to be proved in order to effect his credibility (14 New York, 492).

In 31 New York 518, "the testimony of a deceased witness given on a former trial of the case was read as evidence. Subsequently, defendant offered to read the disposition of this witness in a chancery suit, for the purpose of contradicting his evidence as read, and impeaching him. The testimony was ruled out because no foundation was laid for it."

The same rule was held in 81 Ky. 255, the court there holding that where the testimony of a witness, given upon a former trial, was repro-

duced, the witness having died, testimony to the effect that he, subsequent to the former trial, stated that the evidence given by him on the former trial was not competent."

The same rule is held in 156 U. S. 240, 15 U. S. 69, 20 Ohio 460, 37 Ark. 324, 94 Ga. 624, 35 Neb. 504, 133 N. Y. 124.

In Brown v. Com. 73 Pa. 321, on a hearing before a justice of the peace of a prisoner charged with murder, the testimony of a witness for the commonwealth was taken in writing. The witness having died, it was held that the notes of his testimony were admissible on the trial.

By act of 1887, Section 3, it is provided that "whenever any person has been examined as a witness either for the commonwealth or for the defence in any criminal proceeding conducted in or before a court of record, and the defendant has been present and has had an opportunity to examine or cross-examine, if such witness afterwards die, or be out of the jurisdiction so that he cannot be effectively served with a subpœna, etc., properly proven notes of his examination shall be competent evidence upon a subsequent trial of the same criminal issue."

From Brown v. Commonwealth, supra, and the provision of this act, it would seem that the rule in this state was contrary to the rule in most of the other states, but in 206 Pa. 277, which was as to the effect of the evidence given before a magistrate, notes by a stenographer, were read under objection made by the prisoner's counsel, they having been duly verified by the interpreter, it was held that: Its admission is not sanctioned by Section 3, Act of 1887, P. L. 158, because it was not taken in a court of record. Then in view of this last case cited and the act of 1887, Pennsylvania is in line with the majority of states in holding that such offers of testimony is not competent and thus the trial court did not err in excluding the offer.

Since the trial court did not err in excluding the first offer, so as to the second which we think was also rightly excluded, because if the character of the impeachment is such as would tend to raise a doubt in the minds of the jurors it would be impeaching the witness without having an opportunity for the witness to respond.

Offers of defendant refused aud judgment affirmed.

## OPINION OF THE SUPREME COURT.

The 2nd section of the act of May 23, 1887, P. L. 158. relating to the competency of witnesses, etc., provides that "whenever any person has been examined as a witness * * * in any criminal proceeding conducted in or before a court of record, and the defendant has been present and has had an opportunity to examine or cross-examine, if such witness afterwards die * * * properly proven notes of his examination shall be competent evidence upon a subsequent trial of the same criminal issue; but for the purpose of contradicting a witness, the testimony given by him in another or in a former proceeding, may be orally proved."

Authorizing the use of testimony in a court of record, is, the unsophisticated reader would think, an implied negative of the right to use testimony not delivered in such a court; else, why, in what purports to

be a codification of the law on this subject, mention the court of record? Nevertheless, as before 1887, so since, it is assumed that testimony delivered before a magistrate or justice of the peace, may be proved at the subsequent trial (Commonwealth v. Keck, 148 Pa. 639; Commonwealth v. Lenousky, 206 Pa. 277).

The act of 1887 takes pains to require the former evidence to be proved by means of notes properly proven; allowing oral proof only when the witness has testified on both occasions, and the object is merely to show a contradiction between the two testimonies. But, probably the courts will as lightly repudiate this limitation, as that concerning a court of record. In the case before us, notes were used, and whether oral proof would have been admissible it is unnecessary for us to consider.

When a witness is to be discredited by showing former statements inconsistent with his present testimony, the ordinary method is first to interrogate him concerning such repugnant statements. The rule is not so absolute that the trial court may not safely exercise a discretion (Sharp v. Emmet, 5 Whart. 288; Walden v. Finch, 70 Pa. 460; 23 P. & L. Dig., col. 41769; 2 Wigmore, 1194). In the case before us an observance of the rule would have been impossible. Declarations prior to the hearing could not have been proved at the hearing by the defendant, because his witnesses are not then heard. Nor does it appear that the defendant then knew of these declarations. It would be a stupid rule that would prevent his showing the jury what the real value of Maple's testimony was, because he had not obtained Maple's denial of having uttered the statements, or his explanations of them.

As respects declarations made by Maple since his testimony was delivered before the justice, it is quite clear that he could not then have been questioned. They had not yet been made. The subsequent death of Maple ought not to entitle his evidence to go before the jury without the infirmation resulting from proven subsequent inconsistent statements. It is a sufficient concession to a party to allow him to employ the former testimony, without, at the same time guarding it from the discredit naturally attaching to the assertions of an inconsistent person.

The fact that Maple had accused another than Nones of the larceny, was an implied assertion whith is incompatible with his imputation of it to Nones. Proof of this accusation ought to have been allowed.

Had Maple testified before the jury, it is evident that the defendant could have proven the badness of his reputation. The circumstance that the testimony was not delivered before the jury, but before a justice, cannot exempt it, when the effort is made to induce the jury to believe it, from the impeachment to which it would have been exposed if delivered to that jury. A dying declarant can be thus impeached (2 Wigmore 1813). An attesting witness, though he himself is not on the stand, may be impeached, or supported as any witness (2 Wigmore 1876). Book entries may be discredited by proof of the bad reputation for veracity of the entrant (2 Wigmore 1912). It was error, therefore, to prevent the defendant's exposing the reputation of Maple for veracity to the jury which was to weigh his testimony.

Judgment reversed with *v. f. d. n.*

## COMMONWEALTH v. SNODGRASS.

### Burglary.—Accessory.—Principal Mistakes.

STATEMENT OF FACTS.

William Snodgrass offered John Boyer $50 if he would burglarize the house of Seth Thompson. Boyer accepted the offer and Snodgrass gave him a description of the house of Thompson and its approximate location. By mistake Boyer burglarized the house of one Henry Payne which was an exact duplicate of Thompson's and which was located next to Thompson's.

Graupner for Commonwealth.
Rooke for Defendant.

OPINION OF THE COURT.

MISS LONG, J.—The indictment presents for determination the question: Is the defendant Snodgrass, in view of the peculiar state of facts, guilty of the crime of burglary as accessary before the fact?

If Boyer had robbed the house the defendant had procured him to rob, there would be no question as to whether Snodgass is equally guilty with the principal Boyer, as accessary before the fact.

In the Cyclopedia of Law and Proceedure, Volume 12, page 190, an accessary before the fact is defined as one who was absent at the time the felony was committed but who counseled, procured or commanded another to commit it. And he is equally guilty with the principal.

Snodgrass procured Boyer to commit a felony at a certain described house but Boyer intending te rob that certain house, robbed a house next door, the exact duplicate of the house that Snodgrass had described.

Does this mistake which the principal Boyer made, cause the crime of the instigator Snodgrass to be any the less grievous?

Trickett on Criminal Law, Volume I, page 153, states that those who procure, excite or counsel a crime are now regarded as doing that which they thus procure and they can be indicted, tried, convicted and punished in all respects as if they were princlpals.

Counsel for the defendant contends that because the principal failed to commit the crime at the particular house described, Snodgrass could not be held as accessary before the fact.

In Clark's Criminal Law, page 110, there appears a statement that if a person advises another to give poison to a particular person, and it is given to a different person, he is not accessary to the murder. The two authorities cited are: 7 N. W , 583, and 55 Iowa, 321, and the above statement is qualified by the principle contained in them.

State of Iowa v. Lucas, 7 N. W. 583, states the doctrine of the second case, State of Iowa v. Lucas, 55 Iowa 321 to be: When one orders or advises the commission of one crime and the principal intentionally commits another, he is not answerable as accessary to the crime so committed.

In the case at bar the crime was not intentionally committed at the wrong house.

Reg v. Saunders, Plowd 473 was explained in the American and English Encyclopedia of Law, Volume I, page 265, as follows: A counsels B to poison C. B gives C a poisoned apple. C hands it to D, who, B remaining silent, eats it and dies. A is not accessary to the murder of D.

Reg v. Sanders, Plowd 473, in the Cyclopedia of Law and Procedure, Volume 12, page 191, states the test to be, "Did the principal commit the crime he standeth charged with under the influence of the flagitious advice, and was the event in the ordinary course of things, a probable consequence of that felony? Or did he, following the suggestions of his one wicked heart, willfully and knowingly commit a felony of another kind?

Testing the case at bar we find that to both questions, "Was the crime committed, a probable consequence of the crime solicited?" and "Was the mistake intentional?" the answers warrant a decision against the defendant Snodgrass.

In Clark's Criminal Law, page 110, it is stated that one is not liable as accessary if the act done is essentially different from that counselled or commanded. But in this case the crime the principle committed is the same as that counseled.

The American and English Encyclopedia of Law, Volume I, page 265, states that the instigator is an accessary before the fact, if the crime committed is the result of a mistaken attempt to follow the instructions given by him, and cites two cases.

(1) If the intent be to kill one person, and the principal by mistake kills another, this will not be a defense to the accessary. Wynn v. State, 63 Miss 260.

(2) A may be accessary before the fact to the murder of B, if the murder was committed by C, in the belief that B was another person whose description was given by A to C, with the intention that such other person should be murdered by C. Foster P. C., 372-372.

This latter case is the same as the case in question with the exception that it is a case of murder while the present case is one of burglary.

Under similar circumstances instigators of murder, a crime more grievous than burglary, are held as accessories, to be equally guilty with the principal. We must hold that the defendant, Snodgrass, in this case is guilty of the crime of burglary.

## OPINION OF THE SUPERIOR COURT..

A careful study has failed to discover much authority upon the question involved in this case; but the weight of that which has been found supports the conclusion of the learned court below. Foster in his work on homicide says that if A advises B to kill C, and B kills D, thinking him to be C, A is responsible as accessory to the murder of D. The same view is taken by Russell on his work on crime (1 Russell on Crimes 63). In Saunders Case, 2 Plow 473, it is said: "If I command A to burn the house of B, *which he well knows*, and he burn the house of C, then I

shall not be accessory because it is another distinct thing to which I gave no consent or command, but wholly different to my command." "By which," says Hawkins," it seems to be implied that it is a necessary ingredient in such case to make B no accessory *that he knew the house he was commanded* to burn, for if he did not know it, but mistook another for it, and, intending to burn the house he was commanded to burn, happen by such mistake to burn the other, it may probably be argued that the commander ought to be accessory to the burning because it is the direct and immediate effect of an act wholly influenced by his command (2 Hawkins C. L. 444).

In Wharton on Homicide, page 77, it is said that "if the principal commit the same offense against B by mistake instead of A, the accessory would seem to be responsible." And it has been stated generally that if the instigator uses any ambiguous terms he is responsible for any misconstruction the ambiguity may produce (1 Bishop C. L., 641, 1 Wharton C. L. 230). In Jennings v. Commonwealth ( (Ky.), 16 S. W., 348) a person was apparently held responsible though there was evidence that the principal, acting alone, had by mistake killed the wrong person.

As a matter of principle there is no good reason why the defendant should not be held responsible in this case. His moral guilt is certainly as great as it would have been had Boyer made no mistake and the injury to the public is certainly no less. Boyer was acting under the influence of the command of Snodgrass and in a bona fide attempt to execute it. It is difficult to understand why the command of Snodgrass was not the direct and immediate cause of the injury or why the injury was not the direct and immediate result of the command of Snodgrass.

The present case comes well within the rules stated by the learned court below. The crime committed was a probable consequence of the crime advised and Boyer was acting under the influence of the advice.

Judgment affirmed.

## COMMONWEALTH v. WILSON.

### Information Made on Belief.—Quashing Indictment.

STATEMENT OF FACTS.

Wilson was arrested on a warrant issued by a justice on the information of X, who swore one, Slape, had been killed and to the best of his (X's) knowledge and belief had been killed by Wilson. An indictment charging Wilson with the murder of Slape was found a true bill. Motion to quash the indictment.

Buckley for Prosecution.

Houseman for Defendant.

OPINION OF THE COURT.

YARNALL, J,—The defendant here is held on the oath of X, who swore that to the best of his knowledge and belief Slape had been killed by Wilson. Section 8 of Article 1 of the Constitution of Pennsylvania

provides as follows: "The people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures, and no warrant to search any place, or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."

As a general rule a justice of the peace or other examining officer or magistrate has no authority to issue a warrant unless upon written complaint or affidavit, verified by oath, showing that an offense has been committed and that probable cause exists to believe the accused committed that crime. He cannot hold an offender arrested on his own personal view without a written complaint (Matter of Memorial Citizens' Association, 8 Phila. 478).

The exceptions as in the case of the district attorney or other prosecuting officer do not apply here.

In 12 Cyc. 293 it is said that "In some jurisdictions the complaint or affidavit must state facts on the complainant's positive knowledge, and where it states them upon hearsay or upon information and belief, a warrant cannot be issued, and if the accused has been arrested he must be discharged." Cases of Alabama, Kansas, Maine, Washington, Missouri, New York, and Pennsylvania are cited to sustain this proposition.

In the case at bar there are no facts stated whereby the justice of the peace might judge for himself as to the probable cause.

In the absence of probable cause, supported by oath or affirmation, no warrant can legally issue.

In the present case, if the defendant has not moved too late he is wrongfully withheld and the motion to quash the indictment should be sustained.

As it appears from the facts, the defendant here is held solely on the information received from X and all the subsequent proceedings from the time of the warrant of arrest are based upon this information. Under these circumstances it cannot be said that the defect in the information is cured by the preliminary hearing had thereon.

The accused is entitled to be heard on the regularity and sufficiency of the proceedings before the magistrate, if he moves in time. It is the only way or only effective way to preserve his rights under the constitution. He may have the proceedings reviewed on a writ of habeas corpus or on a motion to quash, and it seems that his application will be in time if made before pleading to the indictment (183 Missouri 299; Commonwealth v. Clement, 8 Dist. 705).

The defect in the case at bar is not merely one of form but one of substance.

Motion to quash the indictment is sustained.

## OPINION OF THE SUPREME COURT.

The indictment should not have been quashed. The objection to it is, not that it was found by the grand jury on no evidence, or on illegal evidence. So far as appears, witnesses cognizant of the facts appeared before that tribunal, ahd delivered testimony fully warranting its finding

the bill "true," and its putting the accused on trial before the country.

The objection to the indictment is that the person who made the indictment before the justice on whose warrant the accused was arrested, did not profess to know the facts to which he deposed, but professed to make the information upon "the best of his knowledge and belief." He did not disclose the source of his knowledge. On several occasion, this feature of the information has been held not to be a ground for quashing the indictment. Commonwealth v. Story, 6 Justice of Peace, 133; Commonwealth v. Jossel, 1 Lehigh Co. L. J. 115; 1 Cross Reference Annual, 1572. In Commonwealth v. Mallini, 214 Pa. 50, the accuser charged Mallini with killing Rippe "on information received," which information or the source of it was not disclosed. At the trial a motion to quash was made. Says Mitchell, C. J., "It was too late. The indictment was regularly found after a hearing before the justice, and such finding cannot be invalidated for any such reason." Cf. also Commonwealth v. Brennan, 193 Pa. 577; Com. v. Campbell, 22 Super. 98. In Com. v. Green, 185 Pa. 641, the Supreme Court approved of the refusal of the court below to discharge the accused even before the indictment was found, upon *habeas corpus.*

The order quashing the indictment is reversed with *procedendo.*

## ADDISON v. SARK.

### Slander, By Insane Person.—Sense in Which Words Were Used.

STATEMEMT OF FACTS.

Action for slander charging unchastity. The defences were (*a*) that the words used though usually imputing unchastity were not used by the defendant in order to impute unchastity; (*b*) Mary Sark was insane when she uttered them and did not know that she was imputing unchastity. The court excluded both defences. Verdict for $300 for the plaintiff. Defendant appeals.

McKinney for Plaintiff.
Smith for Defendant.

OPINION OF THE COURT.

WATKINS, J.—We are here called upon to decide two questions which seem not to be very well settled; viz: (1) whether words claimed to be slanderously spoken and not understood by the hearers are actionable; (2) whether an insane person is liable for the tort of slander.

It is the opinion of most of the authorities that the effect of slanderous words is to be determined by the sense which readers or hearers of common and reasonable understanding would ascribe to them. In this case the hearers did not understand the words to impute unchastity. Then how could any damage come to the plaintiff if the hearers did not believe what was said. Neither has she shown any damage as the direct result of the slanderous words; although it is not necessary to show special dam-

age when the words charged fall within the class of slander *per se*, yet we are bound to say that words charging want of chastity are not actionable unless special damage is proven Wilson v. Goit; (17. N.Y., 442, Shafer v. Ahalt, 48 Md., 171; Pollard v. Lyon, 91 U. S., 225).

It is held in Hayes v. Ball, 72 N. Y., 448. that if it appears that all the persons present at the time of the speaking of the words, understood from facts in their knowledge or which they had otherwise learned, that the words referred to a transaction which would not in law constitute larceny, the cause of action is not made out.

The slander and the damage consist in the apprehension of the hearers, by which we understand that the speaker or writer is accountable for the import of the words as they will naturally be understood by the hearer or reader. The test of this liability in a civil action is not what was his secret intent, but what is the meaning of his words (Hankinson v. Belby, 16 M. & W., 445; Golfler v. Wilhelm, 17 Pa., Sup. Court. 432). It was held in Erlbeck v. Burle, 84 Iowa 47 that if the defendant did not intend his words to have a slanderous meaning and they were not understood in that sense, he was not liable for the speaking. As regards the insanity of the defendant, it is the reasonable rule that an insane person is liable for the actual damage done by his slanderous words (9 Mass., 352; 23 Misc. (N. Y.,) 158); and it is even held in 6 Humph. (Tenn.) 199 that insanity is a good defence to an action for slander.

Therefore we find that the Court erred in excluding both defences and a new trial must be granted.

Here the plaintiff has not shown any special damage whatsoever, and

## OPINION OF THE SUPERIOR COURT.

In order that an action for slander may be maintained the slanderous words must have been communicated to some third person who understood them (25 Cyc., 366; 18 A. & E., 1019). In accordance with this principle, if the words of the defendant had been spoken in a foreign language, or to very young children, the defendant would have been entitled to show that the hearers by reason of their ignorance of the language, or their immaturity, did not understand them (Sheffell v. Van Duesen, 13 Gray, 304; Sullivan v. Sullivan, 48 Ill. App. 435; 18 A. & E.; Encyc. 1019; 25 Cyc. 367). And if because of either of these reasons the hearers had ascribed to the words a meaning other than the one imputing unchastity, it cannot be doubted that the defendant would have been permitted to show this fact.

The reason why the words are not interpreted in a slanderous sense is not important. If, when infancy or ignorance of a foreign language is the cause of such misinterpretation, the defendant is permitted to show such misinterpretation, there is no good reason why he should not be permitted to show such interpretation when it arises from other causes.

Cooley in his work on torts says that in interpreting words alleged to be slanderous, "it is not a question of the intent of the speaker *or even the understanding of the plaintiff*, but of the *understanding of those to whom the words are addressed*," and that "defamation consists solely in

the effect produced on the minds of third parties" (Cooley on Torts, page 217).

"The slander and damage consists in the apprehension of the hearers" (Fleehood v. Curley, Hobart, 268). "The question, therefore," says Odgers, "is always: How did those to whom the words were published understand them? This clearly is rather a question for the jury than the judges" (Odgers on Slander & Libel (144) et seq.).

If the words of the defendant had been such as did not *ex vi termini* convey an actionable imputation the plaintiff would have been permitted to prove the extrinsic circumstances which made the words on this particular occasion convey such imputation, (18 A. & E., 979). The words used by the defendant were such as usually impute unchastity and, in absence of evidence to the contrary, this court would presume that the hearers understood them to impute unchastity, but if the defendant is prepared to show that they were not so understood, there is no principle or policy which requires the court to deny him the right to do so. If the plaintiff is permitted to show that the hearers ascribed to the words a meaning different from that usually given them there is no reason why the defendant should not have the same right.

The opinion of the learned court below leaves us in doubt as to whether he thought the insanity of the defendant was or was not a defence to an action for slander and it has been said that "the question is somewhat unsettled" (22 Cyc., 1212). When the primitive notion that a doer of harm was absolutely responsible therefor was so far modified that misadventure or accident on the part of the doer became a defense, it would have been entirely logical for the courts to treat the acts of a lunatic as involuntary, and consequently, as not tortious. This, however, was not done, and the general rule is that a lunatic is liable for any tort which he may commit (22 Cyc., 1211; Beals v. Lee, 10 Pa., 56). This rule, it is true, has not found favor with the text writers who contend that the reasons on which it is based are very unsatisfactory, but as a general principle it has never been denied in this country or England (Burdick on Torts, 60).

It has been held that the general rule does not apply to torts which involve malice or intention and it has, therefore, been held that, since malice is an essential ingredient of slander, an insane person is not liable therefor. But the better rule is to the effect that since malice in fact is in reality not an essential element of slander save where the publication is privileged, the liability of a lunatic for slander is governed by the general rule (Burdick 60; Nadaunt v. Nadaunt, L. R. 2 P. & D. 103; Ulrich v. Co., 50 N. Y. Supp. 788).

In concluding this case we feel bound to advise the learned court below that in Pennsylvania, and indeed in most jurisdictions, words imputing unchastity are actionable per se, (25 Cy., 317; P. & L. Dig., Vol. 11 c 18505.)

Judgment affirmed.

## COMMONWEALTH v. SAKEMAN.

### Selling Liquor to Minors.— The Vendee Not an Accomplice.

STATEMENT OF FACTS.

Sakeman is tried for selling liquor to a minor. The minor, twenty years old, is the only witness who testified. The court refuses to tell the jury that they should not acquit on the uncorroborated testimony of the minor who was an accomplice. Sakeman, testifying for himself, denied any sale to the minor.

Hollister for Commonwealth.

Rogers for Defendant.

OPINION OF THE COURT.

WOODCOCK, J.—The defendant, Sakeman, was tried and convicted on the charge of selling liquor to a minor. The only evidence against Sakeman was that of the minor to whom he had sold. The age of the minor at that time was twenty years. This sale of liquor was denied by the defendant. The defendant asked the court to give binding instructions for him on the ground that the minor was an accomplice, and they could not convict on his uncorroborated testimony. The Court refused so to charge, and a verdict was rendered for the Commonwealth.

Assigning this as error the defendant asks for a new trial.

Admitting the minor to be an accomplice, the court was not in error in so refusing to charge. There is a rule of evidence which requires that the evidence of an accomplice should be viewed with distrust, but there is no rule that it should be excluded. A careful judge will tell the jury to be suspicious of the testimony of an accomplice, but if he fail to do so, his error is one that will not be considered sufficient cause for a reversal or a grant of a new trial (Com. v. Downing, 4 Gray 29). The question was raised during the argument of this point as to whether the minor was an accomplice. He asked the bartender to sell a drink, and a drink was sold to him. By the acts of 1887 and 1897 the legislature have seen fit to cause it to be a misdemeanor to sell liquor to minors. An accomplice is any one concerned in the commission of a crime, either as principal or accessory. Here as the minor was present at the commission of the crime he had procured, he would be liable as a principal, if liable at all. And as a principal he would have the same penalty affixed to the asking as to the selling.

This contention on the part of the defendant is without any foundation in law, no case sustaining such a statement can be found. It is difficult, however, to draw the line between those crimes, which it is a misdemeanor to procure and those which it is not (Com. v. Millard, 22 Pick. 476). The clearest line runs between those crimes, *mala in se* and those that are merely *mala prohibita*. But even this line is not always sufficient and then the particular offense under consideration must be looked into.

The Pennsylvania statute imposes a penalty on the selling of liquors

to minors, upon the "man who shall sell." Every sale implies a purchaser. It is so clear that the statute only refers to the seller that the intent stands plainly forth in a reading.

The leading case on this subject in Pennsylvania is Cox v. Commonwealth, 125 Pa. 94, in which opinion Paxson, C. J., says: "A jury may believe an uncorroborated accomplice, and if his testimony produces in their minds a conviction of the defendant's guilt beyond a reasonable doubt, they may convict. If the testimony of an accomplice, his manner of testifying, his appearance upon the witness stand, impress the jury with the truth of his statement, there is no inflexible rule of law which prevents conviction. * * * If both court and jury are satisfied he has told the truth, there is no reason why the verdict should not stand. If we laid down an inflexible rule in regard to corroboration there may be instances when criminals will escape although both jury and court are satisfied beyond a reasonable doubt of their guilt." See also 95 Pa. 418; 12 Pa. 338; Com. v. Craige, 19 Sup. Ct. 81. 98 Pa. 338.

The authorities cited all tend to show that the evidence of an accomplice is admissible, and if the jury believe it their verdict must stand.

Had the legislature intended to make it a penal offence to buy drinks as well as sell they could easily have so worded their statute. There is one more point; this act, or one similar to it, has been in force in Pennsylvania for two hundred or so years. While a statute of like nature was in force the legislature did pass an act making it a misdemeanor for a minor to misrepresent his age to obtain a drink. This shows that they never intended the accomplice principle to be used.

## OPINION OF THE SUPERIOR COURT.

The test by which to determine whether a person is an accomplice is the inquiry: Could he have been convicted of the offense either as principal or accessory? If so, he is an accomplice; otherwise he is not (1 Encyc. L. & P., 550; 12 Cyc., 445; 1 A. & E. Encyc. 390).

The authorities are unanimous in holding that the purchaser of liquor which is sold in violation of law, although he knows the sale of it to be illegal, cannot be held guilty of any offense, on the ground of soliciting or tempting the seller to violate the law, or on the ground of of his having aided and abetted the crime to the mere extent of buying the liquor (23 Cyc., 211) and cases there cited.

This is the law ef Pennsylvania: "The man who buys or drinks the liquor is not punishable" (Commonwealth v. Kostenbawder, 30 Atlantic Reporter, 895; Beale's Cases, 814).

It follows that the person who purchases the liquor is not an accomplice of the seller (S. v. Leahan, 50 Com., 101; S. v. Baden, 37 Minn., 212; 34 S. W., 24; Keith v. S. 33 Tex., 678; 44 S. W., 847; 23 Cyc. 210; 1 Ency. L. & P., 559; 1 A. & E. Ency., 390) and cases there cited.

In Commonwealth v. Seffell, 16 Dist. Reports, 169, as a reason for granting a new trial it was alleged that "the testimony of the Commonwealth's one witness was not corroborated and he was a participant in the alleged offence." The court overruled the motion saying, "I hardly think it worth while to say much on the subject of this reason. It is not

a crime to buy liquor on Sunday or from an unlicensed dealer. The officer who bought was not *particeps criminis.*"

Various reasons are given by the courts for the doctrine that one who purchases the liquor is not punishable. It is said that the purchaser is not liable for engaging in the sale for a purchase is the exact opposite of a sale (Sear v. S., 35 Tex. 422). And that the statute specifying only the seller by implication excludes the purchaser (S. v. Rand 51, N. H.).

The purchaser is, however, a vital party to a sale. His act causes a breach of the law; as surely as though he hired another party to stab his enemy.

The cases are properly explained as an exception to general principles based on pubiic policy.

The protection of the drinker intended by the statute would be nullified by his punishment. The state's most potent witness would be lefied through the fear of conviction.

Judgment affirmed.

## BOOK REVIEW.

**Black's Law Dictionary**, by HENRY CAMPBELL BLACK, M. A. West Publishing Company, St. Paul, Minn. Second edition. 1910.

The first edition of this work was largely used by students of law and by lawyers. It was in one volume. The price was moderate. The vocabulary was full, and the definitions, though brief, were, for the most part, adequate and exact. The second edition contains about sixty pages more than the first. The whole of the book has undergone careful revision; many citations, and a good many additional words and phrases have been introduced. The book is really a handsome specimen of the printer's and the binder s art. The paper is white; the type large and clear. We could not indicate to the reader and student in quest of an aid of this class,—and all students and readers of law need such an aid,—a more serviceable one. For a work of 1314 pages, the price, six dollars, may be regarded moderate.

**Commentaries on the Law in Shakespeare**, by EDWIN J. WHITE. The F. H. Thomas Law Book Co., St. Louis, Mo. 1911.

This is a surprising book. Its author, a lawyer, is the writer of several text books, and the editor of the third edition of Tiedeman on Real Property. This book shows that he is not merely a student of law. He is an expert in Shakespeare, and he

has brought up from the depths every allusion by that poet to any legal institutions or principles. The book is divided into 40 chapters. A chapter is devoted to each of 39 plays, and the 40th to the Sonnets. In The Mèrchant of Venice, allusions are discovered to warranty, the penalty of a bond, the sealing of instruments, obtaining evidence by torture, usury, and twenty other subjects. The legal references in each of the other plays are similarly exhibited. The author disclaims any intention to furnish a polemic for the Baconian authorship of the plays, remarking, "It does not follow, however, from these observations, that the law of the plays can furnish any basis for the sensationalist to build up a claim of title to the plays in favor of a lawyer instead of a poet, for the law is merely incidental in the plays, whereas the poetry is that of the master poet of all time." The book is finely printed, and the quotations are accompanied with exegetical remarks which make their signification plain. The book is worthy of the serious attention of every Shakesperean scholar and student.